## Melissa Marie Albert v Malcolm Fernandez and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(A)-1277–06 OF 2018 AND B-02(A)-1278–06 OF 2018
HAMID SULTAN, YEOH WEE SIAM AND HANIPAH FARIKULLAH JJCA
3 DECEMBER 2018

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*Family Law — Custody — Welfare of child of paramount consideration — Whether mother should be given custody of child below age of seven years — Rebuttable presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 — Whether father of child had to adduce cogent evidence to rebut that presumption — Whether presumption could only be rebutted if mother was shown to be unfit to have custody or if she was detrimental to child's welfare — Whether presumption could not be rebutted by way of a mere interview of the child by the presiding judge — Whether facts and circumstances of the case showed child should be in custody of the mother rather than father*

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The two appeals herein were brought by the wife ('the appellant') of the respondent-husband against the High Court's decision dismissing her application for sole custody of the couple's five-year-old son ('Marc') and granting the respondent's application for sole custody of Marc with access to the appellant. In making the orders, the High Court judge had relied upon a previous interview she had had with Marc in her chambers before granting interim custody of the child to the respondent. From that session, the judge concluded that Marc was more comfortable being with the respondent than with the appellant. Although each party had filed affidavits blaming the other for, inter alia, regular quarrels and violent behaviour in their matrimonial home as well as allegations that Marc had been physically abused, the judge held that they remained bare allegations without proof. Based on that previous interview, the judge ruled that in all the circumstances of the case, the respondent had rebutted the presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') that it was 'for the good of a child below the age of seven years to be with his or her mother'.

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**Held,** setting aside the High Court's decision and granting custody of the child to the appellant with access to the respondent:

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(1) The High Court judge erred in law and in fact in holding that the respondent had rebutted the presumption in s 88(3) of the LRA. In her judgment, she did not make any specific findings of fact against the father or the mother to determine whether the statutory presumption had been rebutted (see paras 18 & 39).

(2) The statutory presumption in s 88(3) of the LRA was not easily rebutted by the so-called brief interview of the child by the judge, more so when it was conducted for the purpose of deciding the earlier applications by the parties for interim custody and not for the purpose of deciding the present applications and bearing in mind that the child had not been with the mother for three weeks. It was not even an interview of the child personally, considering that when the judge wanted to put the child at ease with her alone in her chambers, he ran out to look for the respondent. And since the interview was done after the mother had been prevented by the father from having access to the child for three weeks, it was highly probable that Marc might have been feeling estranged from his mother and would naturally have been more attached to the father, not discounting the real likelihood of parental alienation caused to the child by the father against the mother. Even if the interview had been detailed and thorough and the results of the interview had been disclosed to the parents (which was not done in this case), the statutory presumption could not be rebutted solely by an interview (see paras 25–26).

(3) There had to be strong and cogent evidence to rebut the statutory presumption in s 88(3) of the LRA. The evidence adduced by both parties only revealed that the father and mother had serious disputes between themselves and that the mother was a poor employer to her maids. There was no convincing evidence to prove that the mother was unfit to have custody of the child and was detrimental to his welfare (see para 27).

(4) The evidence showed that the mother was the one who had spent most of her time with the child. She gave up her successful career as an accountant and worked flexible hours as a real-estate negotiator to spend more time with Marc and to take care of him. In contrast, the father, a busy litigation lawyer, did not adduce cogent evidence of a good support system at home to take care of Marc. At one time, the respondent's 76-year-old mother took care of the child, but she had recently been hospitalised. The child appeared to have spent a lot of time at the father's office and had also been taken care of by the father's staff at his office. Even if the father's mother and a maid were to look after the child, such care could not substitute a mother's care (see paras 28 & 31).

(5) The records showed that the father had a propensity to deny the mother access to the child and blatantly disregard access arrangements granted by the court. He had kept the child away from school for several days and had prevented Marc from going with his mother for an overseas vacation during the school holidays when it was her turn to have access. Based on the father's track record of keeping the child away from the mother, the court was concerned that should he be granted custody, it was highly

probable he would continue to deny access to the mother. It was critical that a child of tender years like Marc had the nurture and constant daily or regular care of his mother in his most formative years (see paras 33–35 & 38).

**[Bahasa Malaysia summary**

Kedua-dua rayuan ini dibawa oleh isteri ('perayu') suami responden terhadap keputusan Mahkamah Tinggi menolak permohonannya untuk hak penjagaan anak lelaki lima tahun ('Marc') dan membenarkan permohonan responden untuk penjagaan tunggal Marc dengan akses kepada perayu. Dalam membuat perintah itu, hakim Mahkamah Tinggi telah bergantung kepada temuduga sebelumnya yang telah diadakan bersama Marc di kamarnya sebelum memberikan penjagaan sementara anak tersebut kepada responden. Dari sesi itu, hakim memutuskan bahawa Marc lebih selesa dengan responden daripada dengan perayu. Walaupun setiap pihak telah memfailkan afidavit menyalahkan satu sama lain untuk, antara lain, pertengkaran biasa dan tingkah laku ganas di rumah perkahwinan mereka serta tuduhan bahawa Marc telah didera secara fizikal, hakim berpendapat bahawa ianya tetap tuduhan kosong tanpa bukti. Berdasarkan temuduga sebelumnya, hakim memutuskan bahawa dalam semua keadaan kes itu, responden telah menyangkal anggapan di bawah s 88(3) Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') bahawa ia 'untuk kebaikan seorang anak di bawah umur tujuh tahun supaya ia berada dengan ibunya'.

**Diputuskan,** mengenepikan keputusan Mahkamah Tinggi dan membenarkan hak penjagaan anak kepada perayu dengan akses kepada responden:

(1) Hakim Mahkamah Tinggi terkhilaf dalam undang-undang dan fakta dalam memutuskan bahawa responden telah menyangkal anggapan dalam s 88(3) Akta. Dalam penghakimannya, beliau tidak membuat penemuan fakta khusus terhadap bapa atau ibu untuk menentukan sama ada anggapan berkanun telah disangkal (lihat perenggan 18 & 39).

(2) Anggapan berkanun dalam s 88(3) Akta tidak mudah disangkal oleh temuduga ringkas anak tersebut oleh hakim, lebih-lebih lagi apabila ia dilakukan untuk tujuan membuat keputusan permohonan awal oleh pihak-pihak untuk jagaan sementara dan bukan untuk tujuan menentukan permohonan sekarang dan dengan mengambil kira bahawa anak itu tidak bersama ibu selama tiga minggu. Ia bukanlah suatu temuduga anak tersebut secara peribadi, memandangkan apabila hakim ingin meletakkan anak itu dengan selesa dengan beliau sendiri di dalam kamarnya, dia berlari untuk mencari responden. Dan oleh kerana temuduga dilakukan selepas ibu telah dihalang oleh bapa untuk mendapatkan akses kepada anak itu selama tiga minggu, adalah sangat mungkin bahawa Marc mungkin merasa tersisih dari ibunya dan secara semula jadi telah lebih rapat kepada ayahnya, tidak mengabaikan

kemungkinan sebenar pengasingan ibu bapa yang dibuat kepada anak oleh bapa terhadap ibu. Walaupun temuduga telah terperinci dan teliti dan keputusan temuduga telah didedahkan kepada ibu bapa (yang tidak dilakukan dalam kes ini), anggapan berkanun tidak boleh ditolak semata-mata oleh temuduga (lihat perenggan 25–26).

(3) Seharusnya terdapat keterangan kukuh dan kuat untuk menolak anggapan berkanun dalam s 88(3) Akta. Keterangan yang dikemukakan oleh kedua-dua pihak hanya mendedahkan bahawa bapa dan ibu mempunyai pertikaian serius antara mereka dan bahawa ibu adalah majikan yang teruk kepada pembantunya. Tiada keterangan yang meyakinkan untuk membuktikan bahawa ibu tidak layak untuk memiliki hak penjagaan anak dan memudaratkan kebajikannya (lihat perenggan 27).

(4) Keterangan menunjukkan bahawa ibu adalah orang yang menghabiskan sebahagian besar waktunya dengan kanak-kanak itu. Beliau meninggalkan kariernya yang berjaya sebagai akauntan dan bekerja jam fleksibel sebagai perunding hartanah untuk menghabiskan lebih banyak masa bersama Marc dan menjaganya. Sebaliknya, bapa, seorang peguam litigasi yang sibuk, tidak memberikan keterangan yang jelas tentang sistem sokongan yang baik di rumah untuk menjaga Marc. Pada suatu masa, ibu responden yang berusia 76 tahun menjaga anak itu, tetapi baru-baru ini beliau dimasukkan ke hospital. Anak itu kelihatan telah menghabiskan banyak masa di pejabat ayahnya dan juga telah diurus oleh kakitangan ayahnya di pejabatnya. Walaupun ibu kepada bapa dan pembantu rumah menjaga anak, penjagaan itu tidak boleh menggantikan penjagaan ibu (lihat perenggan 28 & 31).

(5) Rekod menunjukkan bahawa bapa mempunyai kecenderungan untuk menafikan akses ibu kepada anak itu dan dengan terangnya mengabaikan aturan akses yang diberikan oleh mahkamah. Beliau telah menjaga anak tersebut dari sekolah selama beberapa hari dan telah menghalang Marc daripada pergi bersama ibunya untuk bercuti di luar negara semasa cuti sekolah ketika gilirannya mendapat akses. Berdasarkan rekod bapa yang menjaga anak itu jauh dari ibu, mahkamah bimbang bahawa jika beliau diberi hak, kemungkinan besar beliau akan terus menafikan akses kepada ibu. Adalah penting bahawa seorang anak pada usia yang muda seperti Marc mempunyai pemeliharaan dan penjagaan harian yang tetap atau biasa oleh ibunya dalam tahun-tahun formatifnya (lihat perenggan 33–35 & 38).]

**Notes**

For cases on welfare of child of paramount consideration, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4068–4069.

**Cases referred to**

*Sia Lee Fei v Soh Kok Kong* [2010] 8 CLJ 492, HC (distd)
*Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan* [2018] 4 MLJ 557, CA (refd)
*Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505, FC (refd)

**Legislation referred to**

Law Reform (Marriage and Divorce) Act 1976 s 88, 88(2), (3)

**Appeal from:** Originating Summons No BA-24F-58–02 of 2018 (High Court, Shah Alam)

*Ambiga Sreenevasen (Honey Tan Lay Ean, K Shanmuga and Nasyrah Samir with her) (Kanesalingan & Co) for the appellant.*
*M Menon (Puspa Ratnam, Ravi Nekoo and Parvinder Kaur with him) (Hakem Arabi & Assoc) for the respondent.*

**Yeoh Wee Siam JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** The following two appeals were heard together before us on 23 August 2018 and 4 September 2018:

(a) Civil Appeal No B-02(A)-1277–06 of 2018 ('Appeal No 1277') in respect of encl 1 of the originating summons ('OS') which OS was filed by the respondent/plaintiff/father of the child ('father'); and

(b) Civil Appeal No B-02(A)-1278–06 of 2018 ('Appeal No 1278') in respect of encl 48 of the OS.

Both appeals were filed by the appellant/defendant/mother of the child ('mother').

**[2]** Enclosure 1 was the father's application for, inter alia, custody, care and control (hereinafter cumulatively referred to as 'custody') of the child, Marc Aiden Fernandez, to be given to the father with access to the mother, together with other ancillary orders.

**[3]** Enclosure 48 was the mother's notice of application to amend the interim custody order dated 12 April 2018 where, in respect of encls 4 and 10, the High Court had granted interim custody of the child to the father pending the hearing of the OS ie the application in encl 1. The mother had applied to vary the interim custody order to reverse it so that sole custody of the child would be given to her.

A BACKGROUND FACTS

**[4]** Briefly, the facts of in the case are as follows.

B **[5]** The father and mother were legally married on 28 May 2011. On 16 December 2012, they were blessed with a son, ie the child.

**[6]** Both parties are professionals. The father is a practising lawyer whilst the mother, a qualified accountant, is now working flexy hours as a real estate C negotiator with Reapfield Properties (HQ) Sdn Bhd.

**[7]** According to the father, their marriage was plagued with disputes and quarrels due to the quick temper of the mother who more often than not always threatened the father by hurting herself, loved to scream and would turn D violent every time her wishes were not complied with. The father alleged that in fact the mother had, on a few occasions, caused damage to their household properties such as breaking the kitchen cabinet door and the door to their bedroom cabinets (paras 19–24 of the father's affidavit in encl 2). The father further alleged that a few of their maids have left their employment because of E the mother's temper and attitude. The father has come to a point where he is now reluctant to engage a new maid to assist in the housework since he is wary of the wife's behaviour and ill treatment of their maid (maid's letter, exh MF4 of encl 2). The father alleged that the mother is always prioritising her side of the family, rather than spending time with their son and him. On or about F 10 January 2018, after yet another quarrel between them, the mother together with the child left their family home in Taman Gasing Indah, Petaling Jaya, and went back to her parents' house.

G **[8]** The mother, in her affidavit in reply admitted that they were always quarrelling not because of her but because of the father's quick temper, dishonesty, abuse and manipulation. The mother denied the allegation of her being destructive of the household items. She averred that instead, those incidents were beyond her control, for example, the glass cabinet fell because it H was loose, and when she was cleaning the glass fragments, the father came back and accused her of causing damage to the glass door of the said cabinet. The mother further averred that she was the one who spent most of the time with the child and managed the child's school timetable and other activities because of her flexible working hours, in contrast to the father who is a fulltime partner I in a law firm and is always busy, and most of the time he would let his mother or their maid to take care of the child.

**[9]** The wife made a counterclaim in the OS by way of her affidavit for custody of the child claiming that she is the better person to care for the child.

DECISION OF THE HIGH COURT

**[10]** The High Court heard both encls 1 and 48 together. On 11 June 2018, the High Court gave order in terms of encl 1 and dismissed encl 48. The effect of such decision and final order is that joint guardianship was given to both parents, but sole custody was given to the father, with access to the mother.

**[11]** The mother is now appealing to this court against the said decision.

DECISION OF THIS COURT

**[12]** Having heard the submissions of both learned counsels, and having perused the records of appeal, on 4 September 2018 we made the following unanimous decision:

(a) Appeal No 1277, on encl 1, is allowed with no order as to costs;

(b) Appeal No 1278, ie the appeal on the interim custody order, has been rendered academic and is therefore struck out with no order as to costs; and

(c) the deposits are to be refunded to the appellant/mother.

GROUNDS FOR OUR DECISION

*The law on custody of a child*

**[13]** The law on granting custody of a child is provided in s 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'):

88 Power for court to make order for custody

(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) *There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother* but in deciding whether that presumption applies to the fact of any particular case, the court shall

A have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently. (Emphasis added.)

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**[14]** The law is very clear. If the child is below the age of seven years, then the presumption under s 88(3) of the LRA is that for the good of the child, he should be with his mother.

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**[15]** Section 88(3) of the LRA was considered by this court in the recent case of *Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan* [2018] 4 MLJ 557 where Umi Kalthum JCA, in delivering the judgment of the Court of Appeal, at pp 563–565 stated the following position of the law on the said D statutory presumption:

[28] The position of the law on the power of the court to make an order for custody of children below the age of seven years old is clearly provided under s 88(3) of the LRA. The law presumes (albeit rebuttable presumption) that it is in the best interest E of the child aged seven years and below to be under the care and custody of the mother unless it can be proven to the court that the child would be better off with someone else.

[29] The rationale behind this presumption has been elucidated in numerous cases. Reference is made to the case of *L v S* [2002] 7 MLJ 584; [2002] 6 CLJ 106 where F Justice Clement Skinner HCJ (as he then was), explained the rationale behind the presumption under s 88(3) of the LRA at p 593 (MLJ), as follows:

The rationale behind this presumption has been explained in a number of cases. It is that this period ie, a child reaches seven years of age, is a period of nurture when a young child is dependent on the mother for its physical and emotional G needs. Thus, in *K Shanta Kumari v Vijavan* [1986] 2 MLJ 216 at p 218, Wan Yahya J (as he then was) said:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young H infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.

And in *Re Orr* [1973] 2 DLR 77 Muloch CJ said:

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> In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ...

And in *W v H* [1987] 2 MLJ 235 Shankar J (as he then was) in deciding that custody of a newborn baby should be given to its mother said at p 242:

> I would state it as a categoric opinion of this court that in such a situation and overwhelming case would have to be shown before a newborn baby should be deprived of the society of its mother. It would be unwise to try and catalogue the circumstances before such an order would be made, but I would venture to suggest that the applicant in such cases would have to come close to proving that the health or welfare of the infant would be put at serious risk if it is left with the mother.

Thus, even though the presumption is a rebuttable one, Shankar J in *W v H* was of the opinion that strong grounds would be needed to rebut the presumption ...

[30] We were of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this presumption. In short, prime facie the care and custody of a child of the tender age should remain with the mother and strong grounds are required to justify depriving the mother of such care and custody.

[31] In this present appeal, other than mere unsubstantiated allegations by the defendant against the plaintiff, there was no evidence to suggest that the plaintiff was an unfit mother to her child.

*Issue*

**[16]** The issue is whether the father had rebutted the statutory presumption in s 88(3) of the LRA for him to be awarded custody of the five year old child.

*Whether the interview of the child can be the basis for the statutory presumption in s 88(3) of the LRA to be rebutted*

**[17]** Upon a thorough reading of the judgment (*RRT* 3 pp 2826–2853) of the learned judicial commissioner ('JC'), we note that the learned JC did set out the submissions of the father (paras 8–13 of the judgment) and the submissions of the mother (paras 14–20 of the judgment).

**[18]** From the evidence adduced before her, the learned JC did not make any specific findings of fact against the father or mother in order to determine whether the statutory presumption in s 88(3) of the LRA has been rebutted. We note that the learned JC merely made a general finding in the following manner:

> [25] It is to be observed in the present case, that notwithstanding the various allegations of abuse inflicted on the said child by both parties, none had led to any prosecution of the parties by the appropriate authorities. Unless and until materials of enough evidentiary value can be adduced to corroborate such allegations, it remains merely that, bare allegations.

> [26] I wish to add that the public display of animosity and hostility between the parents as are discoverable from the contents of their affidavits filed herein leaves the said child in a most unfortunate predicament that a minor his age should not need to go through. It falls upon this court to make the most appropriate order in all the circumstances of the case to minimise, mitigate and relieve the said child from such a distressing situation so that his overall interests, continuing stability and welfare are the primary and only consideration in the exercise of this court's judicial consideration.
>
> [27] All other relevant facts and circumstances of the case have been judiciously considered to determine the course to be applied which is most beneficial and would, in the circumstances of the case duly serves the welfare and interests of the said child and parties cannot oust the protective jurisdiction of the court over the said child in matters of custody and maintenance (see *W v H* [1987] 2 MLJ 235 at p 238 and 241).

**[19]** Thus, despite all the negative evidence that each party had adduced against each other, including allegations of abuse of the child by the other party, medical reports on the child, and police reports lodged by both parties, the learned JC concluded that without corroboration, the allegations merely remain as bare allegations. She further found that none of the various allegations of abuse inflicted on the child by both parties had led to any prosecution of the parties by the appropriate authorities.

**[20]** Pursuant to the above findings of the learned JC, it only means that the statutory presumption in s 88(3) of the LRA remains intact and has not been rebutted by the father to entitle him to be granted custody of the child.

**[21]** The learned JC then went on further to decide the issue based on her interview of the child, and she made the following finding thereof:

> [32] From the said interview, it is apparent that said child has better composure, attachment and dependability on PH. Consequently, it would not be just in the circumstances for the said boy to forcibly separate him from that comfort and the sense of security that he enjoys with PH during this period of nurture in his life. Continuity must be observed. I am satisfied that in all the circumstances of the case the burden of rebutting the presumption under s 88(3) of the Act has been successfully discharged by PH and I gave order in terms of encl (1).

(Note: 'PH' in the above refers to the plaintiff husband or the father.)

**[22]** There is no record in this judgment of the learned JC on encls 1 and 48 dated 8 August 2018 (*RRT* 3 pp 2826–2853) of how the interview was conducted by the learned JC. However, from the submissions of learned counsel for the mother, we note that the learned JC had relied solely on the previous interview of the child that she had conducted for the purpose of determining interim custody of the child.

**[23]** At our own instance, we therefore referred to the learned JC's judgment dated 6 August 2018 (*RRT* 2 pp 2776–2793) in respect of the two applications in encl 4 (by the father), and encl 10 (by the mother) for interim custody of the child. We note that in para 15 of that judgment (*RRT* 2 pp 2790–2791), the learned JC had more to say on the said interview of the child:

> [15] In all the hostility between the parties as revealed in their respective affidavits, I had the opportunity to interview the said child in the presence of his parents and I find the said child to be timid even though he can speak and voice his opinion very well. He was always on PH's lap and despite the fact that DW has not seen the said child for three weeks (as alleged by DW), the said child didn't go running to DW as normally a child that age would do if he misses his mother. But it is not so in this case, I can see that the said child is very close and attached to PH and he talks a lot about his daddy and his office and not once did he refer to the mother. I tried to have a personal interview with the said child where I have asked both parties to leave the said child and pretend that we are playing hide and seek, however when the said child realised that PH was not around, he ran outside looking for PH. The attachment and closeness to the father is plainly obvious where the child appears to be very much composed, relaxed and able to answer my question clearly. The finding of facts because of the court's interview with the child plays a vital role in applying s 88 of the Act.

(Note: 'DW' in the above refers to the defendant wife or the mother.)

**[24]** It was pursuant to that interview that the learned JC had granted interim custody of the child to the father in encl 4, and dismissed the mother's application in encl 10.

**[25]** We are of the view that the learned JC, in deciding encls 1 and 48, had erred in relying on the previous interview that she had conducted for determining interim custody of the child. In the first place, it was not even an interview of the child personally considering that when the learned JC wanted to put the child at ease with her alone in her chambers by playing hide and seek, the child ran away to the outside to look for the father. Secondly, as submitted by learned counsel for the mother, the interview was conducted at a time when the mother had been prevented by the father from having access to the child for three weeks. Thus, in our view, it is highly probable that the child would be feeling estranged from the mother and would naturally be more attached to the father, not discounting the real likelihood of parental alienation caused to the child by the father against the mother. In this respect, we note the Facebook post of the father dated 12 June 2018 at 00:44 hours, on the night after he had been given custody of the child in encl 1, where he talked about ensuring that the child will never be in a 'toxic environment', referring obviously to the mother's environment, and how he told a bedtime story to the child that day, describing his lawyers as 'Guardian Angel', and in particular where he told the child of his 'battle' against the mother:

I told him of how his lead Guardian Angel Pushpa had led the battle. That was his bedtime story today. He was pleased.

**[26]** We are of the considered opinion that the statutory presumption in s 88(3) of the LRA cannot be easily rebutted by the so-called brief interview of the child by the learned JC, more so when it was conducted for the purpose of deciding interim custody in encls 4 and 10, and not for the purpose of deciding encls 1 and 48 in the present matter, bearing in mind that the five year old child had not been with the mother for three weeks. In any case, even if the interview had been detailed and thorough, and the results of the interview had been disclosed to both parties (which was not done by the learned JC in this case), we do not think that the statutory presumption can be rebutted solely by an interview.

*Other factors to be considered for the welfare of the child*

**[27]** Going on the premise that the law presumes that it is for the good of the child below seven years of age to be in the custody of the mother, then there must be strong and cogent evidence to rebut such statutory presumption. In this case, although it was not specifically considered by the learned JC in her judgment, we note that the evidence adduced by the father against the mother, for example, she being of quick temper, often threatening the father by hurting herself, screaming and turning violent every time her wishes were not complied with, breaking the kitchen cabinet door and door to their bedroom cabinets, a few of their maids leaving their employment because of her temper and attitude, and ill treatment of their maid (exh MF4, encl 2, and paras 36–39 of the father's submissions), prioritising her side of her side of family, being too engaged with social media etc, only reveal that both the father and mother had serious disputes in their marriage between themselves as spouses, and that she is a poor employer to her maids. However, there is no convincing evidence to prove that the mother is an unfit mother to have custody of the child, and is detrimental to the child's welfare. In fact, all the allegations of physical abuse of the child by the father and mother were found by the learned JC to be mere allegations, uncorroborated, and no police action was taken against either parent.

**[28]** Contrary to the evidence of child abuse alleged by the father against the mother, and as noted by the learned JC regarding what the mother averred in her affidavit in reply, the mother was the one who spent most of her time with the child. She gave up her successful career in internal audit and worked flexible hours as a real estate negotiator in order to spend more time with, and to care for the child. We note the following submissions of learned counsel for the mother:

The evidence shows that until the dispute arose, the Mother had been the one attending to Marc's educational needs, medical, social, emotional and other daily needs. She was the one who nurtured and took care of him, and spent the most amount of time looking after him whilst the Father was occupied with work and other pursuits. For example, it will be shown (see paragraph 133 below) that the Mother primarily liaised with Marc's teachers and was the one who oversaw and signed off Marc's homework on a daily basis; regularly organised outdoor activities like picnics and playdates for Marc, and took him for birthday parties (be it of other children or organised Marc's own birthday parties); stayed with Marc whilst he was hospitalised and attended to him whilst he was sick at home; did drawings with Marc, liaised with Marc's piano teacher, and generally did almost everything necessary for Marc's welfare on a day to day basis.

**[29]** In *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505, the Federal Court ruled that the paramount consideration in determining the custody of a child is the child's interest and welfare and the court cannot yield on the hurt feelings of either parents though the court may consider their wishes. The child's interest is the sole consideration for the court's determination. In this case the custody of a seven year old boy and five year old girl were given to the father as the children were able to express that they were physically abused by their mother.

**[30]** We have considered the case of *Sia Lee Fei v Soh Kok Kong* [2010] 8 CLJ 492 cited to us by learned counsel for the father where Yeoh Wee Siam JC (as she then was) awarded custody of, inter alia, the five year old twin girls to the respondent/father. In that case, the High Court held that the statutory presumption in s 88(3) of the LRA was rebutted by the finding of facts that the father was the more suitable parent for the good of the twins. There, the father could provide a secure and stable environment for the child and did not travel abroad for work, but was working locally. On the other hand, the petitioner wife/mother was not granted custody of her children since she was volatile and emotional, but more so because she was hardly at home due to her freelance work.

**[31]** We are of the view that the present case ought to be distinguished from *Sia Lee Fei*. In this case, the father is a busy litigation lawyer, and prior to the dispute, most of the time the mother was the one who had time to care for the child. The father did not adduce cogent evidence of a good support system at home to take care of the child. At one time his aged mother, 76 years old, took care of the child, but the aged mother had recently been hospitalised for her heart condition (CCB Vol 1 Tab 12 p 127, para 7.3). It appears to be that the child spent a lot of time at the father's law office, and was also taken care of by the father's staff at his office. Even if the paternal grandmother and a maid, if at all any maid is employed by the father, were to take care of the child, we do not

think that such care can substitute for the mother's own consistent care of the child at home.

*Custody and access are for the welfare of the child*

**[32]** From the records, we note that the father had been denying the mother access to the child. The father disputed the mother's allegations that he had 'abducted' the child on the following three occasions:

(a) 1 February 2012–22 February 2018:
The father refused the mother access, and kept the child away from school for 11 days (CCB Vol 1, Tab 12, p 156, para 26 of mother's affidavit No 1);

(b) 16 March 2018–12 April 2018:
The father did not return the child to the mother in accordance with the interim access arrangement which was reached after parties had gone through private mediation (CCB Vol 2 Tab 27 pp 157–160 — solicitors' letters confirming mediation agreement). The child was held 28 days completely *incommunicado* from the mother. The child was not even sent to school by the father; and

(c) from 27 July 2018 which continued until the hearing of the two appeals in the Court of Appeal before us on 23 August 2018:
The mother went to pick up the child from the father at the start of the school holidays. The mother was due for access over the school holidays, and had planned to take the child on a trip overseas to Australia. No one was present at the father's house. Calls by the mother to the father went unanswered. The father refused to disclose where the child was, despite repeated letters and demands by the mother.

**[33]** Even if the father refuses to acknowledge that he had 'abducted' the child on three occasions, or objects to the mother's use of the words 'abducted' or 'abduction', the fact remains that he had denied and deprived the mother of access, to the detriment of the child. The child did not go to school for numerous days, and this is surely not for the welfare of the child, which ought to be the paramount consideration under s 88(2) of the LRA, and which clearly the father totally disregarded. It is also not for the welfare of the child for the father to prevent the child from going for an overseas vacation with his mother during the school holidays when it was the mother's turn to have access. This is a blatant disregard of access arrangements granted by the court. It is also totally unreasonable considering that the mother had informed the father earlier of such travel plans.

**[34]** We take note of the fact that whilst under the care of the father, the child has developed well and has shown an impressive flair for art and drawn some art

pieces which have been sent to Sireh Pinang Art Colony, and both father and son have been offered to do a 'Father and Son Solo Exhibition' in which they need to come up with 30 art pieces. We are of the view that the father can continue to guide the child and bring out the best in the child even if the mother is given custody of the child, and the father is given regular access. In our considered opinion, it is critical for the welfare of the child to have constant daily or regular care by the mother. A child, in particular one who is only five years old, is of tender age and needs the tender nurture and care of his mother in his most formative years.

**[35]** While every parent has a right to custody of a child, it is also the right of the child, and for the welfare of the child, to be well cared for and loved by both parents. Thus, it is wrong of the father to deprive the child from the care and love of his mother, which only the mother can give. It is therefore wrong for the father to deny access to the mother. Based on the father's past poor track record of keeping the child away from the mother, we are concerned that should custody of the child be given to the father, it is highly probable that he would continue to deny access to the mother.

**[36]** In fact, the records show that in respect of the alleged third abduction, the father has been found to be prime facie in contempt of the High Court order dated 11 June 2018 (which custody order is the subject matter of the appeal on encl 1). The High Court had on 9 August 2018 granted the mother's ex parte application dated 2 August 2018 for leave to commence committal proceedings against the father for, inter alia, denial of access for half of the school holidays.

**[37]** On record before us is also the fact that as on 23 August 2018, when the two appeals came before us, upon a preliminary issue raised by learned counsel for the mother, this court did not proceed to hear the appeals until the father produced the child in court for access to be given to the mother. The case was stood down for more than an hour until after the lunch break to ensure that the father would come to court to hand over the child to the mother. After the child had been handed over to the mother, we then adjourned the hearing pending a possible amicable settlement of the matter between both parties.

**[38]** Unfortunately, both parties could not reach an amicable settlement. Hence, we proceeded to hear the case on 4 September 2018, and decided accordingly. We underscore the fact that the father has a propensity to deny the mother access to the child, regardless of the welfare of the child.

A CONCLUSION

**[39]** Finally, we are satisfied that the learned JC had erred in fact and in law to hold that the statutory presumption in s 88(3) of the LRA has been rebutted by the father and thereby granting custody of the five year old child to the father. We find merits in Appeal No 1277 and allowed the appeal, and set aside the order and decision of the High Court, and substituted it with an order granting custody to the mother with similar previous access arrangements (which had been given to the mother by the High Court in encl 1) to the father.

**[40]** In view of our decision on Appeal No 1277, Appeal No 1278 has been rendered academic, and therefore struck out.

*High Court's decision set aside and custody of the child granted to the appellant with access to the respondent.*

Reported by Ashok Kumar